Supreme Court, U.S.
FILED
OCT 6 2003
OFFICE OF THE CLERK

No. 03-284

IN THE

Supreme Court of the United States

SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS,

Petitioner,

v.

RAYMOND ABRAMS, NICOLE B. SILBERKLEIT, JANET HERMAN, LILY REDNER, BERNARD CARON, ERNEST HAAR, HARRY CYBULSKI, YVONNE LITMAN, CASSANDRA KIRBY CONAHAY FREUND, JEAN-JACQUES FRAENKEL, LILIANE LICHTENSTEIN, and MARIE WEINRAUCH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

ANDREAS F. LOWENFELD*
LINDA J. SILBERMAN
40 Washington Square South
New York, NY 10012-1099
(212) 998-6208

Attorneys for Petitioner

* *Counsel of Record*

183395

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iv
I. The Decision of the Court of Appeals is Inconsistent with the Approach of This Court to Retroactivity.	1
A. The FSIA as a Jurisdictional Statute.	1
B. The Relevance of *Landgraf* to a Jurisdiction-Ousting Statute.	3
II. The Courts of Appeals Are in Conflict on Crucial Questions Concerning the Interpretation of the FSIA.	4
A. Conflict Regarding the Intent of Congress.	4
B. Conflict Regarding State Department Practice.	5
C. Conflict Regarding the Jurisdictional Nature of the FSIA.	6
D. Conflict in Interpreting *Amerada Hess.*	7

Contents

Page

III. This Action Is a Suit Against a Sovereign Defendant, and Is Ripe for Decision at This Time. 7

A. Congress Classified Defendant as Entitled to the Protections of the Immunities Act. 7

B. Review at this Time Is Consistent with the Purposes of the Doctrine of Sovereign Immunity. 8

IV. Plaintiffs Could Have Had No Settled Expectations Concerning a Suit of the Kind Attempted Here. 9

A. The Uncertainty of Prior Case Law and Executive Branch Practice is Inconsistent with Any Finding of "Settled Expectations". 9

B. Prior to 1980, Plaintiffs Could Have Had No Expectation of Bringing a Suit of the Kind Attempted Here. 10

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Altmann v. Republic of Austria, 317 F.3d 954 (9th Cir. 2002), *amended*, 327 F.3d 1246 (2003), (*cert. granted* 9/30/2003) ..... *passim*

Argentine Republic v. Amerada Hess, 488 U.S. 428 (1989) 4, 7

Dole Food Company v. Patrickson, 538 U.S. __, 123 S. Ct. 1655 (2003) 8

Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) .. 10

Hughes Aircraft Co. v. United States, 520 U.S. 939 (1997) 6

Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003) 5

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 3, 6, 7, 10

Lindh v. Murphy, 521 U.S. 320 (1997) 3

Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994) 4, 5

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 9

Rein v. Socialist People's Libyan Arab Jamahirya, 162 F.3d 748 (1998) 9

Sampson v. Federal Republic of Germany, 250 F.3d 1145 (7th Cir. 2001) 5, 7

Cited Authorities

	Page
Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985)	10
Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983)	2
United States Constitution:	
Article III	1
Other Authorities:	
Jurisdiction of United States Courts in Suits Against Foreign States, Report of the House Comm. on the Judiciary, H.R. Rep. No. 94-1487 (1976)	2

This case, like *Republic of Austria v. Altmann*, No. 03-13, *cert. granted* 9/30/2003, raises the question of application of the Foreign Sovereign Immunities Act of 1976 to claims based on events during or immediately after World War II. In *Altmann*, petitioner sovereign contends that when the Act is applied to *confer* jurisdiction, settled expectations of immunity are upset. In this case, petitioner sovereign contends that when the Act is applied to *foreclose* jurisdiction, no justified expectations are upset. Petitioner submits that hearing this case and the *Altmann* case together would materially enhance the Court's understanding of the retroactivity issue by illustrating the important distinction between jurisdiction-conferring and jurisdiction-ousting aspects of the FSIA. As set out hereafter, none of the reasons given in Respondents' Brief in Opposition for denying review is persuasive, and the fact that review has been granted in *Altmann* confirms the importance of the issue both to construction of an important statute and to the foreign relations of the United States.[1]

If the Court chooses to hear the two cases together, Petitioner is prepared to comply with the briefing schedule set for the *Altmann* case.

I. The Decision of the Court of Appeals is Inconsistent with the Approach of This Court to Retroactivity.

A. *The FSIA as a Jurisdictional Statute.*

In contrast to the British and Canadian State Immunity Acts, which address immunity and leave judicial jurisdiction in claims against foreign states to the statutes and rules concerning that subject, the FSIA blends jurisdiction and immunity together. Exception from immunity is defined in part by nexus of the claim to the United States, and jurisdiction of the district courts is conferred or denied depending on grant or denial of immunity.

It is of course true that, in the context of deciding whether a claim against a foreign state instrumentality arises under federal law for purposes of Article III of the Constitution, this Court said that it did, "in view of the potential sensitivity of actions against foreign states and the importance of developing

1. Petitioner notes that it has raised a second question, concerning the propriety of directing an inquiry to the State Department, that is not before the Court in *Altmann*.

a uniform body of law in this area." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 at 489 (1983), quoting the House Report. Chief Justice Burger, writing for a unanimous Court, also pointed out that under the FSIA both subject matter jurisdiction and personal jurisdiction turn on the provisions of the Act:

> Thus, if none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject-matter jurisdiction and personal jurisdiction.

480 U.S. at 485 n.5.

Respondents quote *Verlinden* for the statement, which they italicize, that the Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law, Opp. Br. at 14, quoting from *Verlinden*, 480 U.S. at 497. But in the same passage, also quoted by plaintiffs (but not emphasized), this Court wrote

> The Act thus does *not merely* concern access to the federal courts.

(This time our emphasis). *Id.* at 496.

Thus *Verlinden* confirms that the FSIA does concern access to courts, and is both a jurisdiction-conferring and a jurisdiction-ousting statute. As the House Report on what became the Foreign Sovereign Immunities Act stated:

> The bill is not intended to affect the substantive law of liability. Nor is it intended to affect . . . the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

H.R. Rep. No. 94-1487, p. 12 (1976).

With respect to many types of claims the FSIA is a jurisdiction-conferring statute, in that it clearly defines several exceptions to immunity, some of which were new in 1976 and others were clarified. This is the reason for the number of cases in which plaintiffs have urged that the Act be applied retroactively and defendant sovereigns have argued that to do so would be impermissibly retroactive. In this case,

however, the roles are reversed. In respect to the issue before the Court in this case, to the extent that the Act changed the law at all,[2] the FSIA is clearly jurisdiction-ousting. As both the District Court and the Circuit Court found, Petitioner meets the definition of state instrumentality and none of the exceptions to immunity is applicable.

Petitioner has not contended that the FSIA is "merely" a jurisdictional statute, as Respondents allege (Opp. Br. at 14). Petitioner does contend that the FSIA is a jurisdictional statute for purposes of the retroactivity analysis prescribed in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), as spelled out at pages 19-22 of the Petition and summarized briefly below.

B. ***The Relevance of Landgraf to a Jurisdiction-Ousting Statute.***

The Court of Appeals in the present case accepted plaintiffs' view that if the Foreign Sovereign Immunities Act cannot be used to create jurisdiction where none previously existed — a question to be answered by this Court in *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *amended*, 327 F.3d 1246 (2003), (*cert. granted* 9/30/2003) — then it cannot be used to deny jurisdiction where it did exist prior to 1952. Accordingly, the Court of Appeals remanded with instructions to establish a "record" to determine whether such jurisdiction did exist. But the Court of Appeals failed to appreciate the significance of the distinction between jurisdiction-conferring statutes and jurisdiction-ousting statutes. As set forth above, it is clear that the FSIA was both jurisdiction-conferring and jurisdiction-ousting legislation, and for present purposes the latter.

Four Justices of this Court have explicitly stated that the "long-standing" practice of "applying jurisdiction-ousting statutes" is not affected by its retroactivity decisions. *See Lindh v. Murphy*, 521 U.S. 320, 342 n.3 (1997), quoted in full at Petition p. 21. Justice Scalia in his concurring opinion in *Landgraf* (joined by Justices Kennedy and Thomas) explained that denying jurisdiction over a claim on the basis of a jurisdiction-

2. As set out in pp. 24-26 of the Petition, Petitioner contends that the FSIA did not effect a change in the law, and the Court of Appeals did not make a ruling on the issue.

eliminating statute is not a retroactive application of the statute at all but constitutes the application of a statute prospectively. To put it in present context, applying the FSIA to foreclose jurisdiction in the present context is a clear application of applying the statute "henceforth".

Accordingly, the District Court was correct in applying the Act prospectively, and holding that without jurisdiction conferred by the Act it could not hear the case, and the Court of Appeals was in error in reversing that decision.

II. The Courts of Appeals Are in Conflict on Crucial Questions Concerning the Interpretation of the FSIA.

The basic question raised by this case is whether the Foreign Sovereign Immunities Act is "impermissibly retroactive" when applied to claims that arose prior to its enactment. Respondents' contention that there is no direct conflict in the courts of appeals is wholly unpersuasive in light of the different approaches taken by the several circuits to the question.

The conflict in the circuits with respect to retroactivity and the FSIA, as set forth in the Petition, comprises four aspects – the assessment of the intent of Congress, the appropriateness of looking to the pre-FSIA practice of the State Department, the characterization of the FSIA, and construction of this Court's decision in *Amerada Hess*.

A. *Conflict Regarding the Intent of Congress.*

Plaintiffs argue that the Court of Appeals in this case correctly held that Congress expressed no clear intent to apply the FSIA retroactively (Opp. Br. at 12), and they pretend that there is no circuit conflict on the issue. But the court below itself acknowledged the inconsistency of its ruling with the decision of the Court of Appeals for the District Court of Columbia in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) in interpreting the express language of § 1602 that "Claims of foreign states to immunity should *henceforth* be decided . . . in conformity with the principles [of the Act]." The D.C. Circuit in *Princz* wrote that "the implication is strong that all questions of foreign sovereign immunity, including those that involve an act of a foreign government taken before 1976, are to be decided under the FSIA." *Id.* at 1170. It is true

that in a recent decision about retroactivity and the FSIA, another panel of the D.C. circuit, *Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), has questioned the interpretation of that language in *Princz*, finding that the "henceforth" language was ambiguous. But the conflicting decisions in the D.C. Circuit, along with the recent decisions in *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001), *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *amended*, 327 F.3d 1246 (2003), (*cert. granted* 9/30/2003) and the present case, reflect the continuing confusion that has been generated and the need for the grant of certiorari.

B. ***Conflict Regarding State Department Practice.***

The D.C. Circuit in *Princz* and *Joo*, as well as the Seventh Circuit in *Sampson*, accepted the absolute theory of immunity with respect to suit against a foreign sovereign prior to 1952, without any need to inquire about what the State Department might or might not have done in a given instance. For example, in *Joo*, the D.C. Circuit summarized the clear state of the law:

> [A] foreign sovereign justifiably would have expected any suit in a court in the United States – whether based upon a public or a commercial act – to be dismissed unless the foreign sovereign consented to the suit.

332 F.3d at 683.

In the present case, the Second Circuit, citing the recent decision in the Ninth Circuit in *Altmann v. Republic of Austria*, supra, introduced an additional step into the "impermissibly retroactive" inquiry, concluding on the basis of its reading of history, that the sovereign defendants would not have had "settled expectations" of immunity, and therefore that applying an exception to immunity introduced for the first time in the FSIA (the expropriation exception) would not be impermissibly retroactive. The Second Circuit in the present case took neither the approach in *Sampson* nor the approach in *Altmann*, but remanded the case to the District Court in order to obtain information and establish a "record" with respect to the State Department's position during World War II on the significance of the "corporate form in foreign sovereign immunity determinations," Pet. App. 26a, and what position the

Department "would have taken on claims closely related to war-time crimes of an enemy, such as plaintiffs' claims here." *Id.* at 25a. The purported reason for the inquiry is to ascertain the "settled expectations" of the *plaintiffs* with respect to bringing suit against SNCF in the United States some time in the period prior to enactment of the FSIA.[3] As discussed more fully in the Petition, Petitioner contends that the expectations concern arising from the FSIA relates to the expectations of the foreign sovereign or instrumentality – not whether a plaintiff who failed to sue for the last 60 years has had its "settled expectations" upset. *See* Petition at 23-24 and infra part IV. But the specific conflict among the circuits to which petitioner points concerns the acceptability of such speculative inquiry into the past practice of the State Department, and its inconsistency with the Foreign Sovereign Immunities Act itself.

C. ***Conflict Regarding the Jurisdictional Nature of the FSIA.***

The Second Circuit's approach to the FSIA and the Ninth Circuit in *Altmann* have taken contradictory positions with respect to the jurisdictional aspect of the FSIA. In *Altmann*, the Ninth Circuit held that the FSIA "merely addresses which court shall have jurisdiction" and thus "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties". Citing to *Landgraf* and *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997), the Court of Appeals in *Altmann* accordingly held that application of the FSIA did not have an impermissibly retroactive effect. The Court of Appeals in the present case overlooked the jurisdiction-ousting aspect of the FSIA and held that the Act might be impermissibly retroactive depending on the pre-1952 practice.

As pointed out in Part I(B), *supra*, jurisdiction-ousting and jurisdiction-conferring effects of the FSIA have different

3. That inquiry has already resulted in a letter from the District Court to the State Department asking about its prior practice on immunity. Opp. Br. App. A. In addition, requests for discovery on this issue have been directed to Petitioner. Two other cases, before different panels in the Second Circuit, have been remanded to the district courts to determine what the State Department policies might have been with respect to grants of immunity to Poland and Austria, respectively. *See* Pet. App. E.

consequences for retroactivity. Even if the jurisdiction-conferring impact of the FSIA in Altmann were to be viewed by this Court as impermissibly retroactive, the foreclosure of jurisdiction in this case would nonetheless be prospective and therefore not impermissibly retroactive. With respect to the understanding of the FSIA as a jurisdictional statute and the relevance of the *Landgraf* retroactivity inquiry, the two almost contemporaneous cases present the two basic situations in which the issue arises. Now that review has been granted in *Altmann*, Petitioner urges that the two cases be heard together, with a view to clarifying this Court's construction of the FSIA.

D. *Conflict in Interpreting Amerada Hess.*

Conceding that the FSIA provides the exclusive basis for suing a foreign sovereign, the Court of Appeals in the present case sought to avoid this Court's holding to that effect in *Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989) by qualifying it with the phrase "if the FSIA applies". Pet. App. at 10a. The Seventh Circuit said the exact opposite, in rejecting an attempt to found jurisdiction in a pre-1952 claim on the Alien Tort Statute. *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1148 n.2 (7th Cir. 2001).

III. This Action Is a Suit Against a Sovereign Defendant, and Is Ripe for Decision at This Time.

A. *Congress Classified Defendant as Entitled to the Protections of the Immunities Act.*

In order to distinguish the present case from the general conflict among the circuits on the retroactive effect of the Foreign Sovereign Immunities Act and to disparage the need for clarification of the issue on foreign relations grounds, plaintiffs maintain that their suit "is not a suit against a sovereign government". *See* Opp. Br. at pp. 2, 23. Petitioner SNCF is defined as a sovereign instrumentality by the Foreign Sovereign Immunities Act, and whether SNCF can rely on the immunity to which it is entitled under the Act is precisely the point on which the case turns. The need for clear resolution of this issue another persuasive ground for this Court to grant certiorari.

The court below left no doubt as to SNCF's status under the Act:

> Because the record clearly establishes that SNCF was an agency or instrumentality of France at the time the complaint was filed, it is an agency or instrumentality of a foreign state as defined in § 1603(b).

Pet. App. 12a. In defining which foreign entities were entitled to the protections of the FSIA, Congress has determined that an entity such as SNCF wholly and directly owned by the French government, is within the coverage of the Act, and for most purposes (other than service of process and execution of judgments) is equated to the sovereign state. For plaintiffs to suggest that the interest of the French government is not at stake misunderstands the structure and purpose of the FSIA.[4]

As Justice Breyer pointed out in urging a broader construction of "state instrumentality" than is required to include the present defendant, the FSIA seeks to guarantee the protections provided to the foreign nation "not only when it acts directly in its own name but also when it acts through separate legal entities, including corporations and other 'organ[s]'" *Dole Food Company v. Patrickson*, 538 U.S. __, 123 S. Ct. 1655 at 1665-66 (2003) (Breyer, J. concurring in part, dissenting in part.) It is precisely because of the existing foreign relations interests between the United States and foreign governments, including intrusive and burdensome discovery, that the provisions of the FSIA precluding suit by conferring immunity upon agencies or departments or instrumentalities of a foreign State are to be determined at the time of suit and not at some earlier period. This is the crux of the retroactivity issue in the present case.

B. ***Review at this Time Is Consistent with the Purposes of the Doctrine of Sovereign Immunity.***

Respondents urge that review by this Court be postponed until a further record is developed. But the purpose of the doctrine of sovereign immunity is not merely to shield a

---

4. Of course, if there is any doubt about the interest of the French Republic in this case, this Court could ask the government of France for its views directly.

sovereign from ultimate liability, but to shield it also from the burdens of litigation.[5] As Judge Calabresi wrote for the Second Circuit in *Rein v. Socialist People's Libyan Arab Jamahirya*, 162 F.3d 748 at 756 (1998), "A sovereign that is required to litigate a case on the merits before it can appeal the assertion of jurisdiction over it has not been afforded the benefit of the immunity to which it is entitled," citing to this Court's analogous decision in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). Letting the decision of the Court of Appeals stand until development of a further record would not shed light on the issues raised in the present petition, and would run contrary to the purposes of the immunity doctrine.

IV. Plaintiffs Could Have Had No Settled Expectations Concerning a Suit of the Kind Attempted Here.

A. *The Uncertainty of Prior Case Law and Executive Branch Practice is Inconsistent with Any Finding of "Settled Expectations".*

Plaintiffs' argument that they had settled expectations that they could sue SNCF because it was a "separate entity" at some earlier period belies the record, even as described by the Second Circuit's decision in the present case. The reason for imposing a further inquiry about State Department practice stems from the Second Circuit's uncertainty about the state of the law prior to the enactment of the FSIA. The Court acknowledged the precedents cited by SNCF that "courts have treated national railroad companies as state instrumentalities", but pointed to other cases where a state-owned corporation was treated as an entity distinct from its stockholder. The very inconclusiveness of the case law as described by the Second Circuit, including the need to consult State Department practice, should make it plain that plaintiffs' could have no "settled expectations" that they could bring suit against SNCF prior to 1976. Taking the facts most favorable to plaintiffs, they could have had no reliance interest on being permitted to sue in the United States.

---

5. As noted in fn. 3, requests for extensive discovery have already been served on Petitioner SNCF.

B. *Prior to 1980, Plaintiffs Could Have Had No Expectation of Bringing a Suit of the Kind Attempted Here.*

There is no mystery to the question raised in the Petition (and ignored by Respondents), "If they could have sued then, why didn't they?" Petition p. 24. The fact is that not until well after passage of the FSIA did some courts in the United States consider that they had jurisdiction over the kind of claim attempted in this case. Compare *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) with *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

Respondents here seek to mix and match. They would have the court entertain a cause of action that exists, if at all, only since 1980, on the basis that they had reasonable and legitimate expectations in the 1940s that they could sue the Petitioner in the United States. To suggest that a statute foreclosing suit in these circumstances is "impermissibly retroactive" distorts the message of *Landgraf* and its progeny beyond recognition.

CONCLUSION

None of the reasons advanced by Respondents for denying review is persuasive. The reasons advanced for granting review are even more compelling in light of this Court's grant of review in *Altmann*, and the issues in the present case can be addressed without further development of a record.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

ANDREAS F. LOWENFELD*
LINDA J. SILBERMAN
40 Washington Square South
New York, NY 10012-1099
(212) 998-6208

Attorneys for Petitioner

* *Counsel of Record*